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IN THE
Supreme Court of the United States

JAMES OBERGEFELL, ET AL., PETITIONERS,
v.
RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL., RESPONDENTS.

[Additional Captions on Inside Front Cover]

On Writs of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

BRIEF OF *AMICI CURIAE* SAME-SEX ATTRACTED MEN AND THEIR WIVES IN SUPPORT OF RESPONDENTS & AFFIRMANCE

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VALERIA TANCO, ET AL., PETITIONERS,

v.

BILL HASLAM, GOVERNOR OF TENNESSEE, ET AL.,
RESPONDENTS.

APRIL DEBOER, ET AL., PETITIONERS,

v.

RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL.,
RESPONDENTS.

GREGORY BOURKE, ET AL., PETITIONERS,

v.

STEVE BESHEAR, GOVERNOR OF KENTUCKY ET AL.,
RESPONDENTS.

TABLE OF CONTENTS

INTRODUCTION AND INTEREST OF *AMICI* 1

SUMMARY OF THE ARGUMENT 5

ARGUMENT 7

I. Contrary to petitioners' arguments, man-woman marriage laws do not prohibit foreclose, disqualify, and/or exclude same-sex attracted men and women from the institution of man-woman marriage. 7

II. Significant numbers of same-sex attracted men and women choose the unique institution of man-woman marriage. 20

III. The institution of man-woman marriage is unique because of its procreative power and complementary capacity 26

IV A constitutional mandate requiring same-sex marriage sends a harmful message that it is impossible, unnatural, and dangerous for the same-sex attracted to marry members of the opposite sex. 33

CONCLUSION 38

APPENDIX A: List of *Amici* 1a

TABLE OF AUTHORITIES

Cases

Bostic v. Schaefer, 760 F.3d 352 (4th Cir.), *cert. denied*, 135 S. Ct. 316 (2014) 28

Lawrence v. Texas, 539 U.S. 558 (2003) 4, 34

United States v. Windsor, 133 S. Ct. 2675 (2013) 2

Statutes

Mich. Comp. Laws § 551.1 27

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Desire of the Everlasing Hills (2014), https://everlastinghills.org/ 24

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Eve Tushnet, *Gay and Catholic: Accepting My Sexuality, Finding Community, Living My Faith* (2014) 24

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Spiritual Friendship, http://spiritualfriendship.org/about 24

Unpublished Statement by Doug Mainwaring, Mar. 24, 2015 (on file with counsel of record) 21

Unpublished Statement by Jeff Bennion, April 1, 2015 (on file with counsel of record) 27

Unpublished Statement by Jeff Bennion, Mar. 27, 2015 (on file with counsel of record) 21, 27

Unpublished Statement by Joseph Stith, Mar. 25, 2015 (on file with counsel of record) 30

Unpublished Statement by Vicki Stith, Mar. 30, 2015 (on file with counsel of record) 31

Video Essay by Bill and Louise Seger (June 11, 2013), http://ldsvoicesofhope.org/voice.php?v=22..... 10, 34

Video Essay by Blaine and Lindsay Hickman (Dec. 9, 2013), http://ldsvoicesofhope.org/voice.php?v=39..... 34

Video Essay by Brent and Anissa Olsen (Aug. 26, 2014), http://ldsvoicesofhope.org/voice.php?v=59..... 1, 18, 35

Video Essay by Dale and Unhui Larsen (Mar. 27, 2013), http://ldsvoicesofhope.org/voice.php?v=7..... 11

Video Essay by Danny and Erin Caldwell (Sept. 23, 2013), http://ldsvoicesofhope.org/voice.php?v=30.....7, 10, 35, 36

Video Essay by Garrett and Sallie Ferguson (Nov. 4, 2013), http://ldsvoicesofhope.org/voice.php?v=35..... 17

Video Essay by Jeff and Tanya Bennion (Mar. 27, 2013), http://ldsvoicesofhope.org/voice.php?v=6..... 12

Video Essay by Josh and Lolly Weed (Feb. 24, 2013), http://ldsvoicesofhope.org/voice.php ?v=12 ..... 21, 36

Video Essay by Joshua and Alyssa Johanson (July 25, 2013), http://ldsvoicesofhope.org/ voice.php?v=25 8

Video Essay by Kory and Colleen Koontz (Mar. 29, 2013), http://ldsvoicesofhope.org/ voice.php?v=1 16

Video Essay by Lucas and Wrylon Jones (Jan. 21, 2014), http://ldsvoicesofhope.org/voice. php?v=44 ..... 20, 35

Video Essay by Peggy Matheson (Mar. 27, 2013), http://ldsvoicesofhope.org/voice.php ?v=16 26

Video Essay by Roland Smith (Sept. 29, 2014), http://ldsvoicesofhope.org/voice.php?v=63 13

Video Essay by Travis and Christine Fitz (May 1, 2014), http://ldsvoicesofhope.org/ voice.php?v=53 15

Written Essay by Anissa Olsen (Aug. 26, 2014), http://ldsvoicesofhope.org/essay.php ?e=34 18

Written Essay by Brent Olsen (Aug. 26, 2014), http://ldsvoicesofhope.org/essay.php?e=33 18

Written Essay by Joshua Johanson (June 3, 2013), http://ldsvoicesofhope.org/essay.php?v=24 ..... 9, 36

Written Essay by Stu Back (Dec. 16, 2013), http://ldsvoicesofhope.org/essay.php?e=16 1

INTRODUCTION AND INTEREST OF *AMICI*[1]

I saw families—happy families. There were men who . . spoke openly about [their same-sex attraction] without shame or embarrassment. Their wives seemed happy, fulfilled, and equally unashamed about what their husbands experienced. . I went home, bewildered, unable to comprehend what I had witnessed. These people were thoroughly, unapologetically happy. . . I didn't know how they did it; I only knew I wanted it. It was a new, more realistic vision of my ideal life. There was something to hope for. -- Stu Back[2]

I want people to know that this choice, this choice I made, that Anissa and I made together, is possible and can bring happiness and hope. We have been able to do that. We've been able to have a sixteen-year marriage. We're raising four fantastic sons. -- Brent Olsen[3]

I am so happy that Brent was willing to share his feelings of same-sex attraction with me and then give me the choice to marry him. I am grateful for the option that God has given us to have a family together . . -- Anissa Olsen[4]

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[1] *Amici* are listed in full in Appendix A. This brief is filed with the consent of all parties. *Amici* state that no counsel for any party authored any portion of this brief, and no one other than *amici* and their counsel funded its preparation or submission.

[2] *See* Written Essay by Stu Back (Dec. 16, 2013), http://ldsvoicesofhope.org/essay.php?e=16.

[3] *See* Video Essay by Brent and Anissa Olsen (Aug. 26, 2014), http://ldsvoicesofhope.org/voice.php?v=59.

[4] *Id.*

Amici are same-sex attracted men and their wives. Like petitioners, *amici* same-sex attracted men have a sexual orientation that attracts them to members of the same sex. Most identified their feelings at a young age. Some grew up during an era when gays and lesbians were unwelcome and treated with hostility. Others were raised in more accepting environments, but nevertheless experienced the isolation and confusion of feeling different. All recognize that they can be open and public about their sexual orientation now only because of the profound and dramatic changes in American society, politics, and culture arising from "a new perspective, a new insight," *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013) that has brought much needed tolerance and understanding to the deeply misunderstood and complex reality of same-sex attraction.

Unlike petitioners, however, *amici* choose to build their families on the foundation of marriage between a man and a woman. Most questioned, at some point, whether it was possible for them to have a successful marriage with a woman in light of their physical and emotional attractions to men. Some married decades ago when the pursuit of legal same-sex relationships was never an option. Others married more recently, when they could have chosen same-sex relationships with significant social and cultural support. All agree that marriage between a man and a woman is inherently unique, and all have chosen to marry and remain married to their wives—notwithstanding their attractions to men—because of their realization that such marriages bring joy and happiness to themselves and to their spouses, children, grand-children, and communities.

Their stories are not based on "reparative therapy," so-called attempts to "pray away the gay," or other efforts to *change* sexual orientation. Rather, *amici* fully accept the reality of their same-sex attractions and fully affirm their individual self-worth, just as they are. But they also attest that their attractions do not dictate their relationships. While they do not have a choice about their attractions, they do have a choice about their relationships. And rather than choose the culturally acceptable and popularly celebrated "traditional" same-sex relationship, these same-sex attracted men instead have chosen marriage to a woman. They are not alone. Analysis of the 2013 National Health Interview Survey reveals that 51% of bisexual adults with children and 18% of self-identified gay men and lesbians with children were living in such marriages.

Amici support the rights of democratic bodies to extend marital privileges, rights, and responsibilities to same-sex couples. Through the deliberative and experimental process of representative democracies, truly diverse solutions can emerge. But if this Court were to prematurely terminate the democratic debate over how best to recognize and respond to the complex reality of same-sex relationships by constitutionalizing a right to same-sex marriage, it would finalize and federalize this message—for the same-sex attracted, marriage to a member of the opposite sex is an impossibility, *even meaningless*, and only same-sex marriage can bring gays and lesbians the personal and family fulfillment and happiness that is the universal desire of the human heart. That one-size-fits-all message is false, and the Court ought not to send it.

Worse still, a Constitutional right to same-sex marriage can only come at the cost of marginalizing and demeaning the marriages and families of *amici* and many others like them. Petitioners premise their equal-protection and due-process arguments on the assumption that man-woman marriage laws prohibit, foreclose, disqualify, and exclude gay men and lesbians from marriage and disfavor and demean their very identities and existence. But that could only be true if the marriages of *amici* and others like them are fakes and shams, so contrary to nature as to be entirely undesirable. Petitioners argue, in essence, that the pursuit of a same-sex marriage is the only way for the same-sex attracted "to be true" to themselves; by insisting so, they demean and disparage *amici* and their families.

Whereas a *democratic* right to same-sex marriage is familiarly premised on the proposition that marriage should be extended to include same-sex couples in order to expand individual liberty, a *constitutional* right to same-sex marriage—based on an alleged impermissible discrimination or denial of right—is necessarily premised on the falsehood that man-woman marriage is impossible, unnatural, and dangerous for same-sex attracted men and women. Legalizing same-sex marriage via the Fourteenth Amendment, rather than the ballot box, entitles same-sex couples to marriage only by erasing, marginalizing, and demeaning the same-sex attracted who live in man-woman marriages. Such an erasure of another group's identity and existence is not a "liberty protected by the Constitution." *Lawrence v. Texas*, 539 U.S. 558, 568 (2003).

Rather than expand liberty, such a judgment would not only ignore the deeply fulfilling marriages between same-sex attracted men and women and their spouses, but would also constitutionally demean such marriages and families. Inescapably, striking down man-woman marriage laws on the basis of a constitutional deprivation would send a message to the same-sex attracted that there is only one choice for them, that man-woman marriage is unattainable, that they are acting against their nature for desiring it, and that pursuing it will be dangerous for them, their spouses, and their children. But, in reality, the opposite is true. The institution of man-woman marriage is not an insult; it is an ensign, beckoning to anyone—regardless of sexual orientation—that the union of a man and a woman is uniquely significant because it is endowed with procreative power and complementary capacity.

SUMMARY OF THE ARGUMENT

This brief presents the reality of same-sex attracted men and women married to members of the opposite-sex, and it articulates why constitutionalizing same-sex marriage sends harmful messages about *amici*, their marriages, and their families.

We first explain (Section I) how petitioners' equal-protection and due-process claims derive from the false premise that, for the same-sex attracted, the right to marry a member of the opposite sex is meaningless. We disprove that premise by relating the diverse and successful examples of *amici*, who are same-sex attracted men and their wives.

Section II elucidates that *amici* are not alone. At the time of the 2013 National Health Interview Survey, 51% of bisexual adults with children and 18% of self-identified gay men and lesbians with children were living in man-woman marriages. Such evidence underscores the reality that same-sex attracted men and women live profoundly, and proudly, diverse lives. While some same-sex couples seek same-sex marriages, other gay men and lesbians eschew marriage as antithetical to gay liberation. On the other hand, some same-sex attracted individuals deliberately choose single lives of celibacy, and others choose platonic same-sex relationships. Last, but by no means least, are the significant number of same-sex attracted men and women who choose man-woman marriages.

Section III explains why the institution of man-woman marriage is distinguishable from same-sex relationships, emphasizing the uniquely procreative power and complementary capacity of the union of a man and a woman. Section IV warns of the danger to *amici* should this Court strike down man-woman marriage laws as constitutionally discriminatory. The Court cannot do so without first demeaning the marriages and families of *amici*, and others like them, as impossible, unnatural, and dangerous.

ARGUMENT

I. Contrary to petitioners' arguments, man-woman marriage laws do not prohibit foreclose, disqualify, and/or exclude same-sex attracted men and women from the institution of man-woman marriage.

I can't imagine what life would be like without Erin and without my boys. Some people would probably say, "You're not happy; you're just suppressing things." They can think what they want but I wouldn't want it any other way. -- Danny Caldwell[5]

Underlying petitioners' appeal is this premise: the right of same-sex attracted men and women to marry a member of the opposite sex is *meaningless*.

That premise underlies petitioners' equal-protection arguments that man-woman marriage laws "prohibit gay men and lesbians from marrying," DeBoer Brief 30, "foreclose marriage for gay people," *id.* at 32, "disqualify an entire swath of citizens" from marriage, *id.* at 33, and "exclud[e] lesbians and gay men from the institution of marriage," Bourke Brief 28. Man-woman definitions of marriage can *prohibit*, *foreclose*, *disqualify*, and *exclude* gay men and lesbians from marriage only if it is impossible or entirely undesirable—that is, meaningless—for same-sex attracted men and women to marry members of the opposite sex. Petitioners do not argue that only some, or even

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[5] *See* Video Essay by Danny and Erin Caldwell (Sept. 23, 2013), http://ldsvoicesofhope.org/voice.php?v=30.

many, gay men and lesbians are prohibited from marrying; they insist, and their arguments depend on their proving, that marriage is foreclosed for *all* same-sex attracted men and women.

This same premise underlies petitioners' due-process arguments that they do not seek a new right to same-sex marriage but rather, in their words, "an end to their exclusion from the existing fundamental right to marry." DeBoer Brief 21. Man-woman marriage definitions, petitioners argue, "deny gay people the ability to live within the structure of our civil institutions." Bourke Brief 25. Petitioners, again, presume that same-sex attracted men and women cannot, or should not, marry a member of the opposite sex—else how could they be excluded from the fundamental right of marriage and, therefore, denied the ability to live within the structure of our civil institutions?

Even for same-sex attracted men and women, however, marriage to a member of the opposite sex is not only possible, but can also be deeply fulfilling and meaningful. *Amici* are examples of this reality. Their individual journeys vary widely, but a common thread is a desire to have a wife and children and to live consistently with their beliefs about marriage and family.

(1) *Joshua Johanson*[6] knew he was "different than the other boys." As a young adult, Joshua

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[6] To avoid repetitious citations, the beginning of each story includes a single reference to the source material. *See* Video Essay by Joshua and Alyssa Johanson (July 25, 2013), http://ldsvoicesofhope.org/voice.php?v=25; Written Essay by

moved to California and to "an environment that openly encouraged same-sex relationships. There were guys who were interested in me . . . and it felt so good to be close to other men." But Joshua didn't feel right, so he sought support from a local church community, where he opened up and shared with others about his same-sex attraction.

Not long afterwards, he met Alyssa at a dance. "She knew the real me from early on in the relationship. She had accepted me completely, and I was completely comfortable with her." While they had concerns about Joshua's same-sex attraction, Alyssa recognized that she loved him for who he was, not in spite of his attractions, but *because* of them:

> I found it very striking just after we were planning to get engaged, my brother had redelivered a note to me that I wrote when I was probably fourteen that outlined qualities I was looking for . I was quite struck when I looked at it so many years later, almost double the age I was at when I wrote it, that Joshua was every single one of those things, and every single one of those things was still so important to me. . . It was actually because of some of these traits that he inherently has that he was a very different companion than a person who has heterosexual attractions might be.

Joshua Johanson (June 3, 2013), http://ldsvoicesofhope.org/essay.php?v=24.

Joshua "wasn't even completely convinced marriage was a possibility," and worried that his attractions to men "would bring some difficulty into marriage." But, "I was wrong," Joshua says. "Our sex life has been amazing from day one. There was no awkwardness or need for adjustment. It was just pure and beautiful." Joshua is very clear in explaining that his marriage is *not* the result of *eliminating* his same-sex attraction. "Even though I'm in a wonderful relationship and marriage with my wife, I still have same-sex attraction." The key to that apparent contradiction is that successful marriages are possible not because of the denial of homosexual attractions, but rather their acceptance.

(2) *Bill Seger*[7] grew up in an age with little understanding about same-sex attraction. After many confusing years, he told himself, "Okay, this is it, I'm gay, I can't do anything about it. I might as well just live it." He pursued same-sex relationships, but never felt right. "I wanted to have a family. I wanted to have children and a wife. That was a big issue for me through all this time: family, family, family." Bill and his wife Louise have been married for more than thirty years, and are the parents of three and grandparents of five.

(3) When *Danny Caldwell*[8] reached puberty, he realized "that I had something a little bit different that I didn't think the other kids had to deal with."

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[7] *See* Video Essay by Bill and Louise Seger (June 11, 2013), http://ldsvoicesofhope.org/voice.php?v=22.

[8] *See* Video Essay by Danny and Erin Caldwell (Sept. 23, 2013), http://ldsvoicesofhope.org/voice.php?v=30.

As a young adult, Danny "started looking a lot on the Internet for help with this, and all I could find were things saying you just need to accept this; you just need to be who you are . . because that is who I am and that is who I was born to be. Deep down I knew that wasn't going to make me happy. What I really wanted was a wife and kids but what I kept hearing was, 'Nope, that is not an option for you.' So I didn't want to be alone and I thought this was the only option."

Danny wrote a letter to his mom, explaining his feelings. "She helped me realize what I really did want and that I wasn't going to be happy settling for something less than what I really wanted for myself." Not long after, he met his wife Erin. Eight years, and two boys, later, Danny reflects: "There are so many choices I could have made in my life, and I'm so glad looking back now that I kept what was important to me . . as a central focus because I can't imagine what life would be like without Erin and without my boys. Some people would probably say, 'You're not happy; you're just suppressing things.' They can think what they want but . . I wouldn't want it any other way."

(4) *Dale Larsen*,[9] now father of four and grandfather of nine, recognized his attractions at an early age. After nine years of marriage, and during a period of stress, his attractions "skyrockted." A gay relative "convinced me that I needed to be who I was—that that's who I am and I needed to live my

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[9] *See* Video Essay by Dale and Unhui Larsen (Mar. 27, 2013), http://ldsvoicesofhope.org/voice.php?v=7.

life that way." She arranged for him to go on a date with another man, and Dale recalls, "I looked over and I saw a couple, his brother and sister-in-law, and their little kids and they had the same aged kids I had and the same two boys and a girl. And all of a sudden in my mind, I saw my own family sitting there and the words that came into my mind were, 'If you continue down this path, and you can, you will lose them.' I made a decision that that was it—I was coming back home. I wanted a family so bad. I wanted my wife. I loved my wife."

(5) *Jeff Bennion*[10] did not acknowledge his same-sex attractions until he was a young adult. He had always wanted a wife and kids, but as the years went by, he gradually gave up on the possibility, which led to a period of despair. After a turning point in his life, he was introduced to Tanya, and they began to date. He recalls, "I thought I would have to feel a powerful physical attraction to a woman in order to feel motivated and convinced that I could make a traditional marriage work." But eventually, he decided to do things "backward." Rather than "start with physical attraction and then proceed to emotional intimacy, I was going to start with friendship and emotional intimacy and then, I hoped, move to physical attraction." Jeff and Tanya married. Reflecting on their marriage, he writes:

> It is built on a kind of love that isn't often sung about, that they don't often make movies about, but that is true. It's

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[10] *See* Video Essay by Jeff and Tanya Bennion (Mar. 27, 2013), http://ldsvoicesofhope.org/voice.php?v=6.

> a love that lasts, that you can count on. It is reassuring. It fulfills and comforts and strengthens and understands. It is not just focused on itself. Most important, it is love that you can build two lives around, and even many more.

Tanya once asked Jeff if he missed the possibility of being in a same-sex relationship. Jeff answered:

> Well, I still do experience those feelings, but the better question to ask is: Jeff, have you ever looked out there and seen one of those [gay] couples and wished you weren't married to me? The answer is no. Eight years on, I'm so glad I'm married to you, and the love we have now, it just keeps getting better, it keeps getting stronger.

(6) *Roland Smith*[11] grew up in an unwelcoming era and an abusive environment. At home, his father tried to "toughen him up." At school, he was "bullied a lot . . . beaten up . a lot." His goal during high school was "to just get home and be safe." After being attacked by three young men, a friend of Roland's reported the attack to an indifferent assistant principal who responded, "Well, he's just a queer anyway." Throughout his formative years, he "knew I was on my own."

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[11] *See* Video Essay by Roland Smith (Sept. 29, 2014), http://ldsvoicesofhope.org/voice.php?v=63.

Roland and his wife met later in life. Each had married and then had their marriages end when their respective spouses sought divorce. Roland regrets that he did not tell his first wife about his same-sex attraction before their marriage. After becoming good friends, he asked his current wife to read a manuscript of his life's story. As she read about all of the abuse, she described feeling that it was as if she had been there herself. She felt that it "increased our connection to each other by knowing."

Their relationship began with friendship, not romantic attraction. "It was something that came in a deeper, richer way," Roland describes. "I was blessed with the opportunity of knowing her as a woman and seeing her for the woman that she is without having any sexual connotations to it." After their marriage, intimacy "added that beautiful rich dimension to our life and to our relationship." Reflecting on ten years of marriage, his wife says,

> When we built [our relationship] the way we did, with our friends, and spirituality, and then brought in the intimacy, it just built in a way that it was unlike any other relationship that I've ever had in my life. And we have a beautiful marriage. It's very fulfilling. We're connected. We finish each other's sentences.

(7) During elementary school, *Travis Fitz*[12] "didn't fit in with other boys," but as he grew older, he developed close friendships with other young men in his church community. As a young adult, he came to accept himself and to accept that his same-sex attraction "wasn't something that was just going to go away . . It was who I was, it was part of me, and in being part of me, I needed to figure out a way to handle it I needed to be able to know who I was and be comfortable with who I was . . . " Acknowledging his same-sex attraction, however, didn't change his goals for life. Travis continued to have "hope that all of my dreams could come true," including a wife and children. That dream was realized after one of his close friends arranged a blind date for him with Christine.

Travis did not tell Christine about his same-sex attraction until after several years of marriage. "How am I going to tell her? I was scared, I was nervous, I didn't know how to approach this." Christine was alarmed when Travis told her that he needed to talk with her about something serious. A thought came to her mind that Travis was gay and would be leaving her and their children. She remembers,

> When he finally came out and said, "I have same-sex attraction," I just remember feeling, "Is that it? You're not going to tell me that you're unhappy? You're not going to tell me that you

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[12] *See* Video Essay by Travis and Christine Fitz (May 1, 2014), http://ldsvoicesofhope.org/voice.php?v=53.

> don't want to be married any more, that you don't want this? That's it? We're not over?" And so at that point I was crying because I was so relieved . . . that it didn't mean that our relationship was about to end, because I loved him so much

Christine did have concerns. She wondered, "what if he wakes up and he wants me now, but what if one day he wakes up and he doesn't?" But she dismissed those thoughts as she realized "he had never given me any hint that he was anything but 100% committed to me, to our family, and that he loved me." For them, "life just carried on" and Christine says with confidence to Travis, "I know who you are. You've shown me who you are and I've loved you, and this has been part of you."

(8) At a very young age, *Kory Koontz*[13] identified his same-sex attraction. After his first wife divorced him, Kory considered pursuing a same-sex relationship, but felt that "deep inside, I know that's not what I wanted." A short time later, Kory met Colleen, and they became friends working on a theater project together. Each felt that they were supposed to marry one another and the couple became engaged before ever going on a date. Recalling their wedding day, Kory says, "we were friends, that's all we were."

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[13] *See* Video Essay by Kory and Colleen Koontz (Mar. 29, 2013), http://ldsvoicesofhope.org/voice.php?v=1.

Now, twenty years later, the father of five children, Kory attests, "I stand as a voice to an alterative choice: that a man with same-sex attraction can be fulfilled emotionally, physically, and sexually in a traditional relationship and marriage." Kory has felt judged by some of his gay friends for his choice to marry a woman:

> I don't condemn you for your choice. I accept and love you for who you are. Why can't you give me the same? Why can't you openly love and accept that this is my choice? Yeah, I deal with the attraction, but it's . my choice about what I do with it. Just like it was yours of what you do with it. So I choose this. Why does that make me wrong?

(9) *Garrett Ferguson*[14] grew up "feeling different than other guys." After years of concealing his same-sex attractions, he began to be open with himself and others. He "knew any serious relationship I committed to couldn't be forced" and eventually came to the decision that he would rather live his life unmarried than to pursue a same-sex relationship. "In my mind I was choosing the one thing that scared me most—living a life alone as a celibate man. . Ironically, after making that choice I felt anything but loneliness, despair, or sadness. . I wasn't alone as long as [God] stood by me—as long as I stood by Him. It was surprising

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[14] *See* Video Essay by Garrett and Sallie Ferguson (Nov. 4, 2013), http://ldsvoicesofhope.org/voice.php?v=35.

how accepting that I may never marry was so liberating for me."

Soon after, Garrett became reacquainted with Sallie, a former coworker. He recalls, "I was unsure if a successful relationship was even possible, but I knew that I wanted it." As they dated, Garrett says, "[t]he impossible seemed to be happening," and they eventually married. Sallie reflects,

> When we got married it really wasn't as big of a deal as we both thought it was. There were things that we worried about way more, like we didn't have any money, and we were trying to figure out how to be married. Suddenly I had a lot of issues I didn't know I had because a lot of issues come up when you get married. So Garrett had his, and I had mine, and I was kind of like, you deal with yours, and I'll deal with mine and we'll come together and we'll hopefully have this great marriage; it did, and it worked.

(10) *Brent Olsen*[15] "remember[s] distinctly boys pushing me around in the halls, getting tripped, pushed around, and those kinds of things." Mixed in with his fear was confusion because he "felt a clear, distinct pull, like I was being drawn . to the very

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[15] *See* Video Essay by Brent and Anissa Olsen (Aug. 26, 2014), http://ldsvoicesofhope.org/voice.php?v=59; Written Essay by Brent Olsen (Aug. 26, 2014), http://ldsvoicesofhope.org/essay.php?e=33; Written Essay by Anissa Olsen (Aug. 26, 2014), http://ldsvoicesofhope.org/essay.php?e=34.

[boys] that I was scared of." As a young adult, Brent came to terms with his attractions. "I think I said out loud to myself, . 'I'm attracted to men. It's a physical thing. It's in my body and I have no idea what to do with it.' I felt like I was the only one on the planet."

Brent was ready to give up dating, but then he met Anissa. As they became closer to one another, he felt inspired to talk with her about his attractions. Anissa remembers, "One night, he . . told me he had something very important to tell me." She hoped it might be "about our possible engagement," but instead Brent told her he felt attractions to men. Anissa was surprised at first, but after thinking it over, she responded, "We're going to get through this. You love me, I love you. We'll be fine." At the time, she knew "that it was right." Years before, she had made a list of attributes she desired in a husband, and Brent "had all the attributes on my list; he was definitely someone I wanted to marry."

Brent and Anissa both believed that his same-sex attractions "would go away" once married, but Brent says, "the Lord had other plans." He still felt the attractions, and he was afraid to tell Anissa. Ten years later, it came to a head when Brent told her that his attractions had never changed. Anissa was scared, but Brent's openness started them "back on a path toward renewed closeness."

By "being open, being authentic" about his attractions, Brent's life turned around. It wasn't always easy. At one point, someone Brent had trusted told him that he needed "to be true to

[himself], and leave [his] family," which caused him to doubt his decisions. But he also met other men with experiences like his own, which replaced his fears with faith. Now, Brent reflects, "I'm at a point where I have so much relief because I'm no longer holding out that [my attractions] will be removed from me. Instead, I embrace it as a teacher because it has taught me so much." Brent no longer desires to have his attractions "replaced with something else" because he realizes that his life's experiences have made him and his marriage stronger.

Thinking about his life and his family, Brent says, "I want people to know that this choice Anissa and I made together is possible and can bring happiness and hope. We have been able to do that. We've been able to have a sixteen-year marriage. We're raising four fantastic sons." Anissa is grateful that Brent "wanted to give our marriage a chance." Looking back, she says, "I am so happy that Brent was willing to share his feelings of same-sex attraction with me and then give me the choice to marry him. I am grateful for the option that God has given us to have a family together "

II. Significant numbers of same-sex attracted men and women choose the unique institution of man-woman marriage.

[T]here are a lot of couples like us; just not everyone has a reason to open their mouths. -- Wrylon Jones[16]

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[16] *See* Video Essay by Lucas and Wrylon Jones (Jan. 21, 2014), http://ldsvoicesofhope.org/voice.php?v=44.

This is something that is a part of a lot of people's lives, and nobody is talking about it. -- Lolly Weed[17]

People like me have always been around, but we seldom have any reason to speak up. -- Jeff Bennion[18]

[T]here are hosts of other same-sex attracted men and women . . . quietly living their lives either as singles or married, faithful to their [opposite-sex] spouses and families. They don't seek to draw attention to themselves. They are quiet, unsung heroes. And they are legion. -- Doug Mainwaring[19]

While petitioners' claims reinforce a now popular and culturally dogmatic perception that same-sex marriage is the universal political and personal goal of all same-sex attracted men and women, the reality is far different. Even among those who "strongly support the principle of marriage equality," sociologist Kathleen Hull observes, "at the level of personal experience and desires, they are more ambivalent."[20] And significant numbers of same-sex attracted men and women also choose man-woman marriage rather than pursue same-sex relationships and marriage.

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[17] *See* Video Essay by Josh and Lolly Weed (Feb. 24, 2013), http://ldsvoicesofhope.org/voice.php?v=12.

[18] Unpublished Statement by Jeff Bennion, Mar. 27, 2015 (on file with counsel of record).

[19] Unpublished Statement by Doug Mainwaring, Mar. 24, 2015 (on file with counsel of record).

[20] *See* Sharon Jayson, "Not all gays and lesbians want to marry, research shows: Experts say many couples may get married at first, but the numbers will level off," *USA Today*, June 29, 2013, http://www.usatoday.com/story/news/nation/2013/06/27/same-sex-marriage-research/2465023/.

The evidence on this point is straightforward. In a study of the 2013 National Health Interview Survey (NHIS), demographer Gary Gates of UCLA's Williams Institute estimates that 4 in 10 LGB adults (40%) reported being married or in a cohabiting relationship with a partner.[21] Adjusting for the increase in marriages following this Court's ruling in *Windsor* (from July through December of 2013), Gates estimates that 19% of those same-sex couples were married by the end of the year. Thus, even assuming that the 40% of LGB adults who reported being married or in a cohabiting relationship were coupled with a same-sex partner (as explained further below, that's not always the case), Gates' study suggests that, at the conclusion of 2013, no more than 7.6% of the adult LGB population had entered into same-sex marriages. By comparison, more than 50% of the non-LGB population was married.

While state man-woman marriage laws partly explain the discrepancy, it is not the whole story. Significant numbers of same-sex couples living in jurisdictions that do not allow same-sex marriage have already married in jurisdictions that do,[22] so while nationwide legalization would likely increase

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[21] Gary J. Gates, "LBG Families and Relationships: Analyses of the 2013 National Health Interview Survey," October 2014, http://williamsinstitute.law.ucla.edu/wp-content/uploads/lgb-families-nhis-sep-2014.pdf.

[22] Gates notes that as many as "12% of married same-sex couples lived in the South," *id.*, suggesting that these couples were married in other states that had legalized same-sex marriage, since such marriages were not then legal in the South.

the percentage, many same-sex couples who desire to marry have already done so. Furthermore, studies of other countries where same-sex marriage has been legal do not show significantly higher rates of same-sex marriage among LGB adults.[23] Thus, while the U.S. rate might rise, it is unlikely to be dramatically higher.

The reality is that same-sex attracted men and women live profoundly, and proudly, diverse lives. As explanation for the low marriage rates, some commentators have focused on the fact that there are mixed views on whether marriage is a good model for same-sex relationships:[24]

> In ways that may surprise many, the marriage issue has proven controversial even within lesbian, gay, bisexual, and transgender (LGBT) communities. Queer critics argue that marriage is a mechanism of social and sexual control, thus antithetical to the founding principles of gay liberation. LGBT

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[23] A study of the Canadian Community Health Survey collected from the years 2005, 2007, 2008, and 2009 (all years after same-sex marriage became legal nationwide) found that 12.2% of lesbians were married and 4.9% of gay men. *See* Douglas W. Allen and Shih En Lu, *Matching, Marriage, and Children: Differences Across Sexual Orientation*, unpublished, Dec. 2014, available at http://www.sfu.ca/~allen/Matching16Dec2014.pdf.

[24] Kathleen E. Hull, "Same-Sex, Different Attitudes," *The Society Pages: Social Science That Matters*, Mar. 27, 2014, http://thesocietypages.org/papers/same-sex-different-attitudes/; *see also* Mary Bernstein and Verta Taylor, eds., *The Marrying Kind?: Debating Same-Sex Marriage within the Lesbian and Gay Movement* (2013).

> feminists express concern that same-sex marriage cannot be disentangled from the patriarchal roots of the institution of marriage itself.

But what receives much less attention is the reality that many self-identifying LGB do not choose same-sex romantic relationships *at all*. Some, for example, choose celibacy and affirm the value of single life.[25] Consider the online community "Spiritual Friendship," which was "born out of frustration with the prevailing narratives about homosexuality from those who embrace [a] traditionally Christian sexual ethic: an excessive focus on political issues, and the ubiquity of reparative therapy in one form or another. We want to see more discussion of celibacy, friendship, the value of single life, and similar topics."

Others choose platonic same-sex relationships. Consider, for example, two of the stories chronicled in the recent film *Desire of the Everlasting Hills*:[26] (1) "Even after breaking off the relationship, Rilene remained friends with Margo [her former partner] and cared for her in her final days as she died of cancer"; and (2) "Paul explains that his friendship

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[25] *See* http://spiritualfriendship.org/about; *see also, e.g.*, Eve Tushnet, *Gay and Catholic: Accepting My Sexuality, Finding Community, Living My Faith* (2014).

[26] *Desire of the Everlasting Hills* (2014), https://everlastinghills.org/.

with the man who was his intimate partner for about 25 years is better than ever, now that he is chaste."[27]

Last, but by no means least, significant numbers of same-sex attracted men and women actually choose *opposite-sex* relationships. Gates' study of the NHIS reveals that, "[a]mong bisexual adults with children, 51% were married with a different-sex spouse, 11% had a different-sex unmarried partner, and [only] 4% had a same-sex spouse or partner." Even "[a]mong adults who identified as gay or lesbian and were raising children, 18% had a different-sex married spouse and 4% had a different-sex unmarried partner."[28]

Why would almost two-thirds of bisexual adults with children and more than a fifth of gay or lesbian adults with children elect man-woman relationships, principally man-woman marriage? While in times past such relationships were often the only legal and culturally acceptable options, in today's welcoming climate, the decision of same-sex attracted men and women to marry, and remain married, to opposite-sex spouses is a testament to the uniqueness of man-woman marriage as a familial relationship.

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[27] Kathryn Jean Lopez, "Bruised, Battered, Redeemed," *National Review*, July 22, 2014, http://www.nationalreview.com/article/383337/bruised-battered-redeemed-kathryn-jean-lopez.

[28] Gary J. Gates, "LBG Families and Relationships: Analyses of the 2013 National Health Interview Survey," October 2014, http://williamsinstitute.law.ucla.edu/wp-content/uploads/lgb-families-nhis-sep-2014.pdf.

III. The institution of man-woman marriage is unique because of its procreative power and complementary capacity.

Two men or two women together is, in truth, nothing like a man and a woman creating a life and a family together. Same-sex relationships are certainly very legitimate, rewarding pursuits, leading to happiness for many, but they are wholly different in experience and nature. -- Doug Mainwaring[29]

I said to [my husband], we were crying, and I said one plus one is way more than two, man and woman equal way more. It was just this incredible experience; it was one of those moments where life just expanded in one of those ways that you just can't describe. We were like, wow, this is just so incredible what the potential of what this man and woman can do together. Not [just] us, but any man and any woman. -- Peggy Matheson[30]

I have discovered that mothers "mother" and fathers "father." This dynamic seems ideal to me in teaching and guiding our [son]. . When he is looking for comfort and nurturing (after hurting himself, for example), he usually goes to his mother for comfort. When he is looking for courage to do some intimidating task, or to pick himself up after the pain

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[29] *See* Doug Mainwaring, "I'm Gay and I Oppose Same-Sex Marriage, Mar. 8, 2013, http://thepublicdiscourse.com/2013/03/9432/.

[30] *See* Video Essay by Peggy Matheson (Mar. 27, 2013), http://ldsvoicesofhope.org/voice.php?v=16.

and get back in the game, he looks to his father. -- Jeff Bennion[31]

In seeking to prove that same-sex relationships and man-woman marriage are "constitutionally indistinguishable," DeBoer Brief 60, petitioners offer a definition of marriage divorced from children. While petitioners characterize marriage as primarily a "means in our society of seeking personal fulfillment and acquiring community esteem," Bourke Brief 14, *amici* see something more. For them, marriage is "inherently a unique relationship between a man and a woman," Mich. Comp. Laws § 551.1, owing to its procreative power for creating life and complementary capacity for rearing children.

The procreative uniqueness of man-woman marriage requires little explanation in light "of the biological reality that couples of the same sex do not have children in the same way." Pet. App. 26a. While Petitioners insist that "it demeans married couples to say that marriage is simply about the capacity to procreate," Bourke Brief 47, their insistence that marriage has *nothing* to do with procreation—and is not even rationally related to it—is, to use Petitioners' own words, "a conception of marriage so divorced from reality [that it] would wilt in the glare of the public eye and mystify Americans for generations to come," Bourke Brief 50.

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[31] Unpublished Statement by Jeff Bennion, Mar. 27, 2015 (on file with counsel of record); Unpublished Statement by Jeff Bennion, April 1, 2015 (on file with counsel of record).

The complementary capacity of man-woman marriage is no less significant than its procreative power, though in an era with undefined gender roles it may be less pronounced. While unique contributions of men and women enhance all of our social, cultural, and political institutions, perhaps nowhere are those contributions more observable than in the rearing of children in families. See, for example, Br. of *Amici Curiae* Organizations and Scholars of Gender-Diverse Parenting; Br. of *Amici Curiae* Scholars of Marriage.

But petitioners insist that whether children need both a mother and father is no longer "debatable," DeBoer Brief 40, since "150 studies . spanning nearly thirty years" have proven that they do not, *id.* at 43, and any evidence to the contrary now constitutes a "fringe viewpoint," *id.* at 15. The Seventh Circuit agreed with this assertion, opining, "there is no scientific evidence that parenting effectiveness is related to *parental sexual orientation*," *Bostic v. Schaefer*, 760 F.3d 352, 383 (4th Cir.), *cert. denied*, 135 S. Ct. 316 (2014) (emphasis added). But in highlighting the social science study of "parental sexual orientation," rather than *gender-diverse* parenting, *Bostic* unwittingly acknowledges the critical defect in the available social science, which has focused almost exclusively on the former, to the near exclusion of any study of the latter. See, for example, Br. of *Amici Curiae* American College of Pediatricians.

As same-sex attracted men and fathers of children, *amici* agree emphatically that parental sexual orientation has no bearing on parental

effectiveness or child outcomes. But that issue is fundamentally different than whether children need both a mother and father. Through lived experience, *amici* recognize the unique contributions that they and their spouses provide their children through gender-diverse parenting.

Consider *Doug Mainwaring's*[32] story. Doug first recognized his "strong yearning for men at age eight" and that "proclivity, once awakened, never faded." During his twenties, he felt strongly attracted to close male friends, but limited his affections to "*philia* (the love between true friends)." Doug first met his wife in a choir and "found marriage to be extremely rewarding." They adopted two sons, but a few years later their marriage ended. Feeling "liberated" at first, Doug observes, "the divorce allowed me to explore my homosexuality." But after dating and pursing "a couple of long-term [same-sex] relationships," Doug slowly concluded that "creating a family with another man is not completely equal to creating a family with a woman." He also reasoned that it deprived children of having "parents of both genders at home." So, after ten years of divorce, and with "some doing, . . . we began to pull our family back together." Doug now reflects:

> Over the last couple of years, I've found our decision to rebuild our family ratified time after time. One day as I turned to climb the stairs I saw my

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[32] *See* Doug Mainwaring, "I'm Gay and I Oppose Same-Sex Marriage," http://www.thepublicdiscourse.com/2013/03/9432/.

> sixteen-year-old son walk past his mom as she sat reading in the living room. As he did, he paused and stooped down to kiss her and give her a hug, and then continued on. With two dads in the house, this little moment of warmth and tenderness would never have occurred. My varsity-track-and-football-playing son and I can give each other a bear hug or a pat on the back, but the kiss thing is never going to happen. To be fully formed, children need to be free to generously receive from and express affection to parents of both genders.

While examples of gender-differentiated experiences undoubtedly resonate with many, petitioners assert that these rationales "presume[] stereotypical gender-based roles in opposite-sex marriages that are factually antiquated." DeBoer Brief 41. But the benefits of gender-diverse parenting are not limited to so-called "stereotypical gender-based roles."

Consider *Joseph Stith's*[33] experience. During his growing up years, Joseph doesn't "remember ever being attracted to someone of the opposite sex." But following six years in the United States Marine Corps, he met and married his wife. Now, after thirty years of marriage, Joseph believes that if he had followed his "desires and impulses toward other men, my life would be very different today."

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[33] Unpublished Statement by Joseph Stith, Mar. 25, 2015 (on file with counsel of record).

Like many *amici*, Joseph supports civil unions for same-sex couples, but maintains that marriage is unique and "can only be defined as the union between a man and a woman," especially because of the unique contributions of fathers and mothers, even in non-traditional roles:

> I have abilities my wife came to rely on and I was no substitute for her natural talents as a woman in her care for our children. I know how important it is for children to be raised in a home with both a father and a mother who love them and are committed to their success. My children have been told many times by their friends from single parent homes. just how fortunate they are to have both a Mom and a Dad even with our reversed non-traditional roles (I do the cooking and I hate sports – totally opposite of my dear wife. and it's ok).

Vicki,[34] Joseph's wife, describes having the "best of both worlds." She has a husband who complements her and with whom she has made a family of two children and three grandchildren, yet Joseph's unique qualities make Vicki the envy of her friends:

> I found a man who was dedicated to my happiness but with qualities and sensitivities that my friends wished their

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[34] Unpublished Statement by Vicki Stith, Mar. 30, 2015 (on file with counsel of record).

> husbands had. What woman wouldn't want a husband that can cook, clean, and share the load of building a home together with children that love and respect him? Had Joseph decided to marry another man instead of me, not only would my life have been very different, my children would never have been. The family that my husband longed for all his life was more important to him than anything else and he proved that with his choices.

Even petitioners concede that reasonable regulations on the right to marry "based on criteria other than sexual orientation 'may legitimately be imposed.'" Bourke Brief 23 n.4. And the significant number of same-sex attracted men and women married to opposite-sex spouses—including almost *one fifth* of all gay men and lesbian women raising children, see Section II *supra*—attest to the fact that man-woman marriage laws are *not* designed to exclude based on sexual orientation.

In addition to the man-woman definition, marriage laws also regulate the very young, the already married, and close family relatives. Each is grounded in sociological and/or biological realities. Thus, when petitioners ask this Court to examine "the *nature* of the protected interest, not the *classes of people* entitled to claim protection," Bourke Brief 22, petitioners ignore that the "nature" of marriage has, for millennia, been profoundly influenced by the socially complementary and

biologically procreative capacity of man-woman unions.

While the People may choose to redefine that institution, they are hardly irrational for not doing so. To the contrary, they have compelling reasons to retain the man-woman definition. Petitioners bald assertion that no "legitimate purpose[] of marriage [] is dependent on the gender of the partners," DeBoer Brief 64, ignores millennia of history, extensive social science evidence validating gender-diverse parenting, and the lived experience of countless fathers and mothers—including many who experience same-sex attraction.

IV. A constitutional mandate requiring same-sex marriage sends a harmful message that it is impossible, unnatural, and dangerous for the same-sex attracted to marry members of the opposite sex.

Petitioners' faulty premise that same-sex attracted men and women cannot, or should not, marry members of the opposite sex leads inescapably to this equally false conclusion—it is unnatural and dangerous for same-sex attracted men and women to choose man-woman marriages. Constitutionally mandating same-sex marriage would reinforce this popular sentiment, injuring *amici*, their families, and many others like them.

At the heart of petitioners' appeal is the message that man-woman marriage laws trap same-sex attracted men and women in an irreconcilable conflict with their sexual orientation. "No gay

person should be forced to choose between one's sexual orientation and one's rights as an individual to fundamental liberties, even assuming such a choice could be made." DeBoer Brief 52; Bourke Brief 35. Petitioners' premise—that limiting marriage to man-woman couples interferes with their personal liberty—is wrong. After *Lawrence v. Texas*, 539 U.S. 558 (2003), petitioners are free to pursue whatever romantic relationships they wish, with whomever they wish. All that is at issue here is whether the State must confer the status and benefits of marriage on any romantic relationship the partners wish to have so recognized.

Moreover, petitioners' arguments assume that, for the same-sex attracted, marriage to someone of the opposite sex requires the impossible and undesirable choice of eliminating one's sexual orientation in order to marry. But lived experience suggests that pursuing man-woman marriage can bring more freedom of choice, not less:

- *[M]y feelings don't . . . define me. I'm not what I feel; I'm what I do.* -- Blaine Hickman[35]

- *We can choose our destiny. We can choose the direction we want. It's not easy but the blessings are enormous.* -- Bill Seger[36]

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[35] *See* Video Essay by Blaine and Lindsay Hickman (Dec. 9, 2013), http://ldsvoicesofhope.org/voice.php?v=39.

[36] *See* Video Essay by Bill and Louise Seger (June 11, 2013), http://ldsvoicesofhope.org/voice.php?v=22.

- *I've learned that this is what I want; it is what I believed I wanted in the first place. It is wonderful for me to come back to this point after a long journey and to find that this is still what I want.* -- Lucas Jones[37]

While same-sex attracted men and women do not choose to have their same-sex attractions, they do choose whether to pursue same-sex or man-woman relationships. Unfortunately, cultural messages present the Hobson's choice of either denying the reality of those attractions or foregoing any possibility of a man-woman marriage:

- *I feel like that there are two choices that are pushed out there. One is to deny, suppress, and keep everything inside and pretend that you don't experience same-sex attraction. That's one option. The second option is to be open and [have a same-sex relationship]. Essentially those are your two choices. Anything in between is fake, it's not real.* -- Brent Olsen[38]

- *What I really wanted was a wife and kids but what I kept hearing was, "Nope, that is not an option for you."* -- Danny Caldwell[39]

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[37] *See* Video Essay by Lucas and Wrylon Jones (Jan. 21, 2014), http://ldsvoicesofhope.org/voice.php?v=44.

[38] *See* Video Essay by Brent and Anissa Olsen (Aug. 26, 2014), http://ldsvoicesofhope.org/voice.php?v=59F.

[39] *See* Video Essay by Danny and Erin Caldwell (Sept. 23, 2013), http://ldsvoicesofhope.org/voice.php?v=30.

For the same-sex attracted who desire man-woman marriage, the message that such marriages are "not an option" or "fake" can be devastating:

- *The general consensus seemed to be that these marriages were doomed for failure. . I'm still bitter about all the negativity that is in our culture around this issue because I really had to overcome a lot to even consider getting married in the first place.*-- Joshua Johanson[40]

- *"Before you have kids, think twice about whether you want to continue what you're doing." We reach out for the first time to someone and that was the message we received. It was a kick in the gut.* -- Josh Weed[41]

- *For me, that was what was causing me to want to kill myself. . . [I]t was not knowing that there were other options.* -- Danny Caldwell[42]

Petitioners' reasoning reinforces the perception that the same-sex attracted who choose man-woman marriages are acting at odds with their identities. For example, petitioners insist that man-woman marriage laws must necessarily be the result of "negative attitudes, or fear," "private biases," "[p]rejudice" resulting from "insensitivity caused by simple want of careful, rational reflection," and/or

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[40] *See* Written Essay by Joshua Johanson (June 3, 2013), http://ldsvoicesofhope.org/essay.php?v=24.

[41] *See* Video Essay by Josh and Lolly Weed (Feb. 24, 2013), http://ldsvoicesofhope.org/voice.php?v=12.

[42] *See* Video Essay by Danny and Erin Caldwell (Sept. 23, 2013), http://ldsvoicesofhope.org/voice.php?v=30.

"some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." DeBoer Brief 46; Bourke Brief 30-31.

But as same-sex attracted men themselves, *amici* cannot be prejudiced against gays and lesbians unless, of course, the pursuit of man-woman marriage is so antithetical to their very being that they are, in essence, at war with themselves in pursuing an unnatural and irrational condition. And that is exactly the message that petitioners ask this Court to adopt. So odious are man-woman marriage laws, petitioners say, that they "consign" the "very identities" of gays and lesbians to "official disfavor." Bourke Brief 3-4. Petitioners urge that a constitutionally mandated right to same-sex marriage is "essential to the happiness, autonomy, privacy and liberty of gay people." DeBoer Brief 57. Man-woman marriage laws, they insist, "demean gay people's 'existence [and] control their destiny,'" DeBoer Brief 59, "'disparage' the 'personhood and dignity' of gay or lesbian individuals," *id.* at 60, and "demean the lives of homosexual persons," *id.* at 60.

Striking down man-woman marriage laws on the basis of constitutional discrimination would thus send a message to the same-sex attracted that there is only one choice for them, that man-woman marriage is unattainable, that they are acting against their nature for desiring it, and that pursuing it will be dangerous for them, their spouses, and their children.

But the opposite is true. The man-woman definition of marriage is not an insult; it is an ensign,

beckoning to anyone—regardless of sexual orientation—that the union of a man and a woman is of unique significance in light of its procreative power and complementary capacity. That is the message this Court ought to send.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to affirm the decision of the court below.

Respectfully submitted,

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APPENDIX

APPENDIX A: List of *Amici*

Amici Curiae are same-sex attracted men and their wives who find profound joy and fulfillment in their man-woman marriages. They are:

Jeffrey and Tanya Bennion celebrated their tenth wedding anniversary last July. They have one son. Jeff is a project and property manager for a real estate firm. Tanya is a graphic and web designer.

Danny and Erin Caldwell have been married for seven years and have three sons. Erin works as a registered nurse, and Danny is a clinical mental health counselor in private practice.

Garrett and Sallie Ferguson will celebrate their fifth wedding anniversary in December. They have one boy and one girl. Sallie has put her teaching career on hold while caring for their children. Garrett works at an architecture firm.

Travis and Christine Fitz have been married for six years. Christine is a stay-at-home mom for their three children, and Travis works in management.

Kory Koontz has five children and has been married to his wife for twenty years. Kory is an actor and writer.

Joshua and Alyssa Johanson have been married for six years, and have two boys. Alyssa is a chemical engineer, and Joshua is a computational linguist.

Dale Larsen has been married for thirty seven years, and has four children and nine grandchildren. Dale works as a tool and gauge technician.

Doug and Valerie Mainwaring will soon celebrate their thirtieth wedding anniversary. They have two sons. Valerie is a schoolteacher. Doug is a former real estate agent and is now a freelance writer.

Brent and Anissa Olsen have been married for sixteen years. Anissa is a full-time mom for their four boys. Brent works in human resources.

Bill and Louise Seger have been married for nearly thirty-five years. They have three children and five grandchildren. Bill is a realtor, and Louise is a cosmetologist and massage therapist.

Roland Smith is celebrating ten years of marriage. He works in governmental accounting.

Joseph and Vicki Stith are celebrating thirty years of marriage. They have two children and three grandchildren. Vicki is a hospital quality analyst. Joseph is a former United States Marine and has been a management consultant in the healthcare industry for twenty-five years and is now working with a high-tech startup as director of business development.